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No. 84-363

In the Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 3(d) of the Bank Holding Company Act (12 U.S.C. 1842(d)) authorizes a state to permit the acquisition of banks within its borders only by bank holding companies located in certain regions in the United States.

2. Whether such geographically restrictive state banking statutes, enacted under the authority of Section 3(d) of the Bank Holding Company Act, violate the Commerce Clause or Compact Clause of the Constitution.

TABLE OF CONTENTS

	Page
Opinion	1
Jurisdiction	1
Statement	2
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Board of Governors v. *Investment Company Institute*, 450 U.S. 46	11
Chevron Oil Co. v. *Huson*, 404 U.S. 97	13
City of Philadelphia v. *New Jersey*, 437 U.S. 617, 624 (1978)	5
Conference of State Bank Supervisors v. *Conover*, 715 F.2d 604, cert. denied, No. 83-594, (Apr. 2, 1984)	15
Great Atlantic & Pacific Tea Co. v. *Cottrell*, 424 U.S. 366	5
Harrison v. *PPG Industries, Inc.*, 446 U.S. 578	10
Iowa Independent Bankers v. *Board of Governors*, 511 F.2d 1288, cert. denied, 423 U.S. 875	6-7, 10, 15
Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27	5, 7, 9
New England Power Co. v. *New Hampshire*, 455 U.S. 331	8-9
New Hampshire v. *Maine*, 426 U.S. 363	11
Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408	5, 9
Securities Industry Ass'n v. *Board of Governors*, No. 83-614 (June 28, 1984)	7, 11
South-Central Timber Dev., Inc. v. *Wunnicke*, No. 82-1608 (May 22, 1984)	8, 9, 10
Southern Pacific Co. v. *Arizona*, 325 U.S. 761	10
Sporhase v. *Nebraska*, 458 U.S. 941	8
United States v. *Lorenzetti*, No. 83-838 (May 29, 1984)	16
U.S. Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452	5, 11

Cases—Continued: Page

Virginia v. *Tennessee*, 148 U.S. 503 11
Western & Southern Life Ins. Co. v. *Board of Equalization*, 451 U.S. 648 .....5, 9, 11

Constitution and statutes:

U.S. Const. Art. I:
§ 8, Cl. 3 (Commerce Clause) 3, 4, 5, 10, 14
§ 10, Cl. 3 (Compact Clause) 3, 4, 10, 14
Bank Holding Company Act, 12 U.S.C. 1841 *et. seq.*:
§ 3(a), 12 U.S.C. 1842(a) 3
§ 3(c), 12 U.S.C. 1842(c) 4
§ 3(d), 12 U.S.C. 1842(d) .....*passim*
1983 Conn. Acts 83-411 (Reg. Sess.) 2
Ill. Ann. Stat. ch. 17 (Smith-Hurd 1981):
§ 2510 14
§ 2710 14
Iowa Code Ann. § 524.1805 (West Supp. 1984).... 14
Mass. Ann. Laws ch. 167A, § 2 (Law. Co-op. 1977 & Supp. 1984) 2
N.Y. Banking Law § 142-b (McKinney Supp. 1983) 14
R.I. Pub. Laws S.0661 (1983) 3
S.D. Codified Laws Ann. § 51-16-40 (Supp. 1984).. 14

Miscellaneous:

102 Cong. Res. (1956):
pp. 6856-6863 6
pp. 6857-6858 10
p. 6858 6
p. 6859 6
p. 6860 .....6, 9, 10
p. 6861 6
p. 6862 ..... 6, 10
130 Cong. Rec. H10005 (daily ed. Sept. 24, 1984).. 15
H.R. 2431, 98th Cong., 1st Sess. (1983) 15
S. 2851, 98th Cong., 2d Sess. (1984) 15

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A21-A33) is reported at 740 F.2d 203. The three orders of the Federal Reserve Board at issue in this case (Pet. App. A34-A71, A72-A78 and A79-A87) are reported at 70 Fed. Res. Bull. 374, 353 and 524.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1984. The petition for a writ of certiorari was filed on September 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. Section 3(d) of the Bank Holding Company Act (BHCA) (12 U.S.C. 1842(d) (the "Douglas Amendment")) generally bars a bank holding company that has its principal place of business in one state from acquiring a bank located in another state. But such interstate transactions are permissible under the Douglas Amendment when "the acquisition of * * * a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

In late 1982 the Massachusetts legislature enacted a statute (the "Massachusetts Act") that permits the acquisition of Massachusetts banks by out-of-state bank holding companies.[1] The statute contains a significant limitation, however: it authorizes such interstate acquisitions only if the acquiring bank holding company is located in another New England state (that is, in Connecticut, Maine, Rhode Island, Vermont or New Hampshire).[2] On June 8, 1983, Connecticut enacted a similar statute (the "Connecticut Act"),[3] which authorizes the acquisition of Connecticut banks by holding companies based in the other

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[1] The Massachusetts Act (Mass. Ann. Laws ch. 167A, § 2) (Law. Co-op. 1977 & Supp. 1984)) is reprinted at Pet. App. A101-A102.

[2] The statute also contains a reciprocity provision: it permits the acquisition of Massachusetts banks by out-of-state holding companies only when the home state of the acquiring company grants reciprocal acquisition rights to Massachusetts bank holding companies.

[3] The Connecticut Act (1983 Conn. Acts 83-411 (Reg. Sess.)) is reprinted at Pet. App. A97-A100.

five New England states.[4] Since the enactment of the Connecticut Act, statutes authorizing regional interstate banking have been enacted in seven states; similar statutes have been proposed in at least five other states. See page 12, *infra*.

2. Following the enactment of the Massachusetts and Connecticut Acts, three sets of Massachusetts and Connecticut bank holding companies agreed to merge.[5] These companies then applied to the Federal Reserve Board for approval of the transactions, as required by the BHCA. See 12 U.S.C. 1842(a). The applications were opposed by the petitioners in this case, New York and Connecticut bank holding companies and a Connecticut bank,[6] which argued that the Massachusetts and Connecticut Acts authorizing the acquisitions violate the Commerce (Art. I, § 8, Cl. 3) and Compact (Art. I, § 10, Cl. 3) Clauses of the Constitution.

The Board nevertheless approved the applications (Pet. App. A34-A71, A72-A78, A79-A86). It read

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[4] Rhode Island enacted a similar provision (1983 R.I. Pub. Laws S.0661) in May 1983, although the regional restriction in the Rhode Island act expires on July 1, 1986 (see Pet. App. A103-A106).

[5] Respondent Bank of New England Corporation, a Massachusetts bank holding company, agreed to merge with respondent CBT Corporation, a Connecticut bank holding company; respondent Hartford National Corporation, another Connecticut bank holding company, agreed to acquire Arltru Bancorporation, Inc., a Massachusetts bank holding company; and respondent Bank of Boston Corporation, a Massachusetts bank holding company, agreed to acquire Colonial Bancorp, Inc., a Connecticut bank holding company (Pet. App. A22).

[6] Separate applications were presented to the Board concerning each of the proposed New England transactions. On appeal, the court of appeals consolidated the challenges to the three applications (Pet. App. A26-A27).

the Massachusetts and Connecticut Acts as falling within the literal terms of the Douglas Amendment by "meet[ing] the requirement of express authorization for interstate bank acquisitions imposed by section 3(d) of the Bank Holding Company Act" (Pet. App. A37). The Board then concluded that "there is no clear and unequivocal basis for a determination" that the Acts are inconsistent with the Commerce or Compact Clauses (Pet. App. A37, A74-A75, A83).[7]

The court of appeals upheld the Board's orders. The court of appeals reasoned that the Massachusetts and Connecticut Acts "specifically authorize acquisitions" of in-state banks by out-of-state holding companies and therefore are supported by the Douglas Amendment (Pet. App. A29). This conclusion disposed of petitioners' Commerce Clause argument, the court continued, because "Congress may authorize the states to enact statutes which may interfere with interstate commerce" (Pet. App. A30), and "by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (Pet. App. A31). The court found the state Acts consistent with the Compact Clause because the New England banking arrangement does not "encroach upon or interfere with the just supremacy of the United States" (Pet. App. A32).[8]

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[7] The Board also found that the acquisitions met the traditional competitive, financial and managerial standards set out in Section 3(c) of the BHCA (12 U.S.C. 1842(c)). See Pet. App. A41-A48, A75-A78, A80-A86. These determinations are not challenged here.

[8] The court of appeals also rejected a challenge to the Massachusetts and Connecticut Acts based on the Equal Protection Clause (Pet. App. A32-A33). That challenge is not repeated here.

ARGUMENT

1. Several propositions that control the analysis of this case seem clear. In the absence of congressional authorization, there is little doubt that state restrictions on interstate banking such as the ones in this case would run afoul of the Commerce Clause. See generally *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-371 (1976). Conversely, Congress plainly may authorize the states to regulate interstate commerce in ways that otherwise would be inconsistent with the Clause. See generally *Western & Southern Life Ins. Co.* v. *Board of Equalization*, 451 U.S. 648, 652-653 (1981); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427-432 (1946). Finally, agreements between the states violate the Compact Clause only if they impinge upon an interest of the federal government. See *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 467 (1978). Thus the principal question in this case is whether Congress in the Douglas Amendment authorized the states to enter into regional banking arrangements.

a. While the issue is not entirely free from doubt, we believe that the court of appeals correctly answered this question in the affirmative. Petitioners maintain that the Douglas Amendment should not be read to authorize state enactments that "discriminate against or unduly burden interstate commerce" (Pet. 19 & n.24). But as both the Board and the court of appeals noted, the Massachusetts and Connecticut Acts appear to fall within the literal terms of the Douglas Amendment (Pet. App. A29, A37). The state Acts at issue here plainly are "statute laws"

that "specifically authoriz[e]" the acquisition of "a State bank by an out-of-State bank holding company." 12 U.S.C. 1842(d). And the state Acts undoubtedly were intended to authorize the transactions challenged in this case.

The sparse legislative history of the Douglas Amendment does not directly address the question whether Congress intended to authorize the creation of regional banking arrangements, and therefore does little to illuminate the meaning of the statutory language. Congressional attention during the debate on the Amendment[9] was focused on the provision's creation of barriers to interstate banking (see 102 Cong. Rec. 6862 (1956) (remarks of Sen. Morse); *id.* at 6861 (remarks of Sen. Bricker); *id.* at 6860 (remarks of Sen. Douglas)); there was little attention given to the scope of the power granted states to overcome those barriers. The relevant discussion therefore consists in large part of conclusory statements by Senator Douglas to the effect that his Amendment would "permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them" (*id.* at 6858), would "prevent bank holding companies from expanding across State lines, unless the States give them explicit permission to do so" (*id.* at 6859), or would leave room for the exercise of "State policy" in the banking field (*id.* at 6860). But there was no congressional discussion of the specific types of action that the states might or might not take under the Douglas Amendment.[10] See *Iowa Independent*

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[9] Because the Amendment was adopted on the Senate floor (see 102 Cong. Rec. 6856-6863 (1956)) there is no committee report to explain the Amendment's meaning.

[10] Petitioners cite congressional statements urging that the BHCA be applied in a nondiscriminatory way (Pet. 18 n.22).

Bankers v. *Board of Governors*, 511 F.2d 1288, 1296 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975).[11]

In short, nothing in the legislative history establishes that the unqualified language of the Douglas Amendment does not mean what it says. In these circumstances, the Court should defer to the Board, which rejected petitioners' suggestion that the bank acquisitions challenged in this case were plainly outside the contemplation of Congress when it enacted the Douglas Amendment (see Pet. App. A41, A67). See *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 8.

b. Petitioners also contend that the Douglas Amendment should not be read to validate the Massachusetts and Connecticut Acts because, under this Court's holdings, "an Act of Congress should not be construed to abrogate the limitations imposed on states by the Commerce Clause unless the federal law

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But these statements were not directed to the Douglas Amendment; the cited remarks were made 10 months before the Amendment was proposed and concerned exceptions to the regulatory aspects of the bill.

[11] This Court's only discussion of the Douglas Amendment is equally brief. In *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980) (emphasis in original), the Court noted that "[t]he only authority granted to the States [in the Amendment] is the authority to create exceptions to th[e] general prohibition [on interstate banking], that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited." These comments were made in response to a claim that the Amendment validated state restrictions on the non-banking activities of out-of-state bank holding companies. See *ibid.* It is impossible to draw from this discussion, as do petitioners, the proposition that the Amendment does not permit states to "form regional alliances" in the banking field (Pet. 15-16).

unmistakably authorizes the state conduct at issue" (Pet. 18). The Douglas Amendment fails to provide such authorization, petitioners assert, because it does not declare "that states were authorized to discriminate among their sister states" (Pet. 15). Given the unusual nature of the challenged arrangements in this case—which explicitly create combinations of states that seemingly were designed for the purpose of excluding other states (see Pet. 4-5 & n.6)—this argument is entitled to serious consideration.[12] Again, however, on balance we believe that petitioners' contention fails to carry the day.

It is of course true that, as this Court has noted, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *South-Central Timber Dev., Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 9. But the decisions in which the Court has applied this doctrine have little bearing here. Those decisions came in cases where states sought to find federal authorization for restrictive state conduct by looking to federal policy in analogous areas (*e.g.*, *South-Central Timber*, slip op. 6-10)[13] or by pointing to "standard nonpre-emption clause[s]" in federal enactments (*e.g.*, *Sporhase* v. *Nebraska*, 458 U.S. 941, 959-960 (1982); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342-343

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[12] Thus we note that the New England states could have prevented their banks from being dominated by large out-of-state bank holding companies (see Pet. 4-5 & n.6) by using methods that "discriminated" less overtly against other states qua states—for example, by preventing in-state acquisitions by bank holding companies over a certain size.

[13] In *South-Central Timber*, Alaska tried to justify restrictions on the sale of timber from state lands by pointing to sim-

(1982)). In such cases the Court has declined to "rewrite [congressional] legislation based on mere speculation as to what Congress 'probably had in mind.'" *Id.* at 343 (citation omitted). Taking this tack assures that Congress "affirmatively contemplate[d] otherwise invalid state legislation" when it took the action said to authorize such state activity. *South-Central Timber*, slip op. 9.

Here, however, despite the sparse legislative history, there is no doubt that the state enactments at issue fall within the literal language of the Douglas Amendment. And while Congress did not address in detail the nature of the authorized activity, it realized that it was allowing the states to involve themselves in the regulation of interstate commerce and that the language of the Douglas Amendment did not expressly restrict the nature of that regulation. See 102 Cong. Rec. 6860 (1956) (remarks of Sen. Douglas); *ibid.* (remarks of Sen. Bennett). Cf. *BT Investment Managers*, 447 U.S. at 47.[14] Accordingly, there is no reason to believe that the Douglas Amendment is an insufficiently "clear expression of

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ilar restrictions on the sale of timber from federal lands in the state. The Court concluded that "[t]he fact that state policy * * * appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent. Congress acted only with respect to federal lands; we cannot infer from that fact that it intended to authorize a similar policy with respect to state lands." Slip op. 10.

[14] Indeed, the Court has read analogous legislation to allow the states to take action that otherwise would violate the Commerce Clause. See, *e.g.*, *Western & Southern*, 451 U.S. at 653; *Prudential Ins. Co.*, 328 U.S. at 427-432.

approval by Congress." *South-Central Timber*, slip op. 9.[15] See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

c. This conclusion should suffice to dispose of petitioners' Commerce Clause contentions. Congress " 'may redefine the distribution of power over interstate commerce' by 'permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible.' " *South-Central Timber*, slip op. 5, quoting *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945).[16] And once "Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & Southern*, 451 U.S. at 652-653. Because the Douglas Amendment authorizes the Massachusetts and Connecticut Acts, those statutes are immune from Commerce Clause attack.

d. Petitioners' Compact Clause argument is similarly unpersuasive. That Clause invalidates " 'agree-

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[15] The breadth of the statutory language has special significance in this case. When Congress enacted the Douglas Amendment, it acknowledged that banking historically has been a subject of special concern to states and localities, and it recognized that states always have played a significant role in the regulation of the banking industry. See 102 Cong. Rec. 6857-6858 (remarks of Sen. Douglas); *id.* at 6860 (remarks of Sen. Douglas); *id.* at 6862 (remarks of Sen. Morse). See also *Iowa Independent Bankers*, 511 F.2d at 1296. Given this background, it would be particularly inappropriate here to search for implicit limitations in Congress's unqualified grant of regulatory authority to the states.

[16] We do not understand petitioners to contend that Congress lacks the power under the Commerce Clause to authorize the creation of regional banking arrangements. See Pet. 21-22.

ments that are "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." '" *Multistate Tax Comm'n*, 434 U.S. at 471, quoting *New Hampshire* v. *Maine*, 426 U.S. 363, 369 (1976), in turn quoting *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893). Here—even assuming that the New England banking arrangement constitutes a "compact" within the meaning of the Clause—the Massachusetts and Connecticut Acts are in no way inconsistent with federal supremacy or "hostile" to "federal concerns." *Multistate Tax Comm'n*, 434 U.S. at 488, 489 (White, J., dissenting). To the contrary, the Board has interpreted the Douglas Amendment "as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies" (Pet. App. A52). That interpretation "'is entitled to the greatest deference.'" *Securities Industry Ass'n*, slip op. 8, quoting *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 56 (1981). And in the absence of any federal interest, a state enactment hardly can threaten federal supremacy.

2. While the decision below is correct, whether the Court should grant certiorari nevertheless is a close question. The issues presented by this case are of considerable practical importance and are likely to be raised in other circuits.[17] Their immediate resolution

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[17] Litigation on the validity of banking regions is likely to proceed in Circuits other than the Second. As noted above, banking regions are being created around the nation; petitioner Citicorp, meanwhile, represents that it "has challenged each interstate bank transaction that has come before the Board under the purported authority of a regionally restrictive statute" (Pet. 11 n.14).

by the Court might therefore put to rest significant uncertainties about the future development of the nation's banking system. In addition, this case presents issues concerning the basic relationship of the states to one another, of the sort that this Court often has addressed. On balance, however, we believe that application of the traditional criteria guiding this Court's discretionary review should lead to denial of the petition.

a. The practical importance of the court of appeals' decision is manifest: if the decision is allowed to stand (and if it is not modified by legislation) it might well lead to a significant restructuring of the banking industry as other states follow the lead set by the New England states. Florida, Georgia, South Carolina and North Carolina already have enacted legislation creating a southeastern banking region similar to the one established in New England by the Massachusetts and Connecticut Acts. Utah and Kentucky also have enacted regionally restrictive banking statutes, and it appears that a number of other states are considering similar legislation (see Pet. 10-11 & n.13). Furthermore, a number of intra-region mergers in both the New England and southeastern regions already have been announced or proposed (see Pet. 11; Pet. App. A245; Br. of Amicus Curiae Chase Manhattan Corp. 6-7 n.4). According to the Board, these trends "suggest that, should the New England interstate banking zone be upheld, a system of regional zones may develop involving major areas of the nation" (Pet. App. A38).

These practical considerations suggest that, if the Court believes that it eventually will become necessary to address the issues presented here—either because of their importance, or because of the pos-

sibility that a conflict among the circuits will develop—doing so in this case would be wise. It is reasonable to assume that state legislatures and bank holding companies will rely on the validity of the Second Circuit's decision; if this Court were to repudiate the court of appeals' holding in a future case, a large segment of the banking industry may well have invested considerable resources in pursuing constitutionally infirm activity. In such circumstances, an authoritative decision by the Court in advance of this widespread activity would be of substantial public benefit. Furthermore, a ruling contrary to that of the decision below necessarily either would disturb a number of consummated transactions or, if not made retroactive (see *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-109 (1971)), would leave in place an imbalance in the degree of interstate banking permitted in various states or regions of the country depending upon fortuities such as the timing of the authorizing state legislation, of Board action, and of the consummation of any approved transactions.[18]

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[18] It is worth noting, however, that petitioners have offered no principle that would allow a court to read into the Douglas Amendment the type of implicit limitation that they contend for here but would not also call into question the validity of other state statutes that authorize only a limited degree of interstate banking. Thus the practical effects of a reversal of the Second Circuit's decision would be both narrower and broader than petitioners suggest. Such a decision would not increase the flow of interstate commerce; to the contrary, by limiting the ways in which states could avoid the prohibitory language of the Douglas Amendment, a reversal would significantly curtail the total volume of interstate banking. In particular, a decision in their favor would not permit petitioners to consummate their planned mergers with or acquisi-

b. Despite the importance of this case to the banking industry, we cannot conclude that further review is warranted at this time. While the issues raised are of practical significance, the question presented involves the meaning of a statute rather than of the Constitution (see Pet. App. A196-A197, A198-A200 (statements of Paul A. Volcker), A201-A204 (statement of Emmett J. Rice)). Although petitioners dress their arguments in constitutional clothing, there is no basic disagreement among the parties about the meaning of the Commerce or Compact Clauses; at bottom, this case presents only a relatively straightforward question of statutory interpretation, of the sort that the Court usually does not decide in the absence of a conflict among the circuits.

Here, of course, no such conflict exists. To the contrary, the District of Columbia Circuit—which apparently is the only court of appeals other than the Second Circuit that has addressed the nature of the Douglas Amendment's authorization of state activity—has concluded (in the context of an equal pro-

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tions of banks in other states (see Pet. 3). Conversely, a holding that the Douglas Amendment does not authorize state-imposed restrictions that otherwise would be violative of the Commerce Clause would open to challenge a range of state laws in addition to the regionally-restrictive ones in this case—for example, laws that permit the acquisition of an in-state bank by an out-of-state holding company only when the home state of the acquiring company grants reciprocal acquisition rights to in-state holding companies (see, *e.g.*, N.Y. Banking Law § 142-b (McKinney Supp. 1983)), or laws that permit the entry of out-of-state holding companies into a state only in certain restricted circumstances (see, *e.g.*, Ill. Ann. Stat. ch. 17, §§ 2510, 2710 (Smith-Hurd 1981); Iowa Code Ann. § 524.1805 (West Supp. 1984); S.D. Codified Laws Ann. § 51-16-40 (Supp. 1984)).

tection challenge) that "the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy." *Iowa Independent Bankers*, 511 F.2d at 1297. See *Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 613 (D.C. Cir. 1983), cert. denied, No. 83-954 (Apr. 2, 1984) (the Douglas Amendment "empowered states to discriminate among out-of-state bank holding companies when deciding which could enter"). Our conclusion that there is no present reason to anticipate the development of a conflict among the circuits is based in substantial part on our conclusion that the decision below is correct.

Finally, there is at least a possibility that the questions presented here will be mooted by legislation. Congress recently has considered proposals relating to regional and interstate banking (see Pet. App. A205-A207 (statement of C.T. Conover) (outlining legislative proposals); H.R. 2431, 98th Cong., 1st Sess. (1983)). Indeed, on September 13, 1984, the Senate passed a bill (S. 2851, 98th Cong., 2d Sess.) that would have authorized states to enact regional bank acquisition legislation for a period of five years; the House took no action on the provision before Congress adjourned. There is some indication that the issue will be considered again in the next session of Congress (see 130 Cong. Rec. H10005 (daily ed. Sept. 24, 1984) (statement of Rep. St. Germain)), although congressional action is far from assured.

There is little doubt, however, that the issues raised by petitioners are better suited to legislative than to

judicial resolution. As noted, these issues are ones solely of statutory interpretation. Indeed, this case is but one aspect of a larger controversy involving the degree to which interstate banking is desirable and the methods that might best be used to increase competition in the banking industry. In deciding this case, however, the Court, unlike Congress, would be unable to address the nuances of those issues; its decision could resolve only the narrow question whether the Douglas Amendment permits states to authorize particular types of interstate banking. And in resolving that question the Court would be limited to ascertaining the intent of Congress in 1956—at the same time that the current Congress is considering more recent developments in the banking industry while grappling anew with the issues presented by interstate banking. See *United States* v. *Lorenzetti*, No. 83-838 (May 29, 1984), slip op. 11.

These factors lead us to conclude that this case does not meet the usual criteria justifying a grant of certiorari. The case presents a narrow, albeit important, issue of statutory construction, the issue was correctly resolved by the court of appeals, there is no disagreement among the lower courts, and the matter may well be addressed by new legislation. In these circumstances, review by this Court is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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